"If then the plaintiff was engaged in operating the machine he was operating it for his employer's benefit and it seems to me difficult to suppose that any inadvertence on his part could have gone beyond this: that he was concentrating more on his work for his employer than on his own safety. In the circumstances I am not prepared having regard to the policy of the law which of course, is to protect workmen operating potentially dangerous machinery, to say any inadvertence on the part of the plaintiff amounted to contributory negligence as we understand that expression."

The learned judge in the present case however, considered that the cause of the accident was the failure of the defendant to provide effective supervision to ensure that the plaintiff did not unnecessarily expose himself to risk. It was apparent that in this case the plaintiff and the lorry driver were left entirely to their own devices as to how the loading of the logs was to be carried out, whether to stop or to continue working when it rained.

I am inclined to the view that on the evidence given it could not be said that the plaintiff was to be blamed at all. I would therefore dismiss the appeal with costs. The deposit of $500 is to be paid to the respondent towards his taxed costs.

Suffian and **Gill F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Allen, Gledhill & Ball; Murphy & Dunbar.*

NAYAR v. GIAN SINGH & CO. LTD.

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) November 28, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X-44 of 1969]

Practice and Procedure — Amended statement of claim — Whether has to be signed by solicitor — Whether a pleading — R.S.C., 1957, O. 19 r. 4 and O. 71 r. 1 (10).

The question raised in this case was whether an amended statement of claim in an action is a fresh pleading and therefore must be signed by the solicitor for the plaintiffs as required by R.S.C., O. 19 r. 4.

Held: an amended statement of claim is not a fresh pleading and therefore need not be signed by the solicitor for the plaintiffs.

Cases referred to:-

(1) *The Queen* v. *Cowper* (1890) 24 Q.B.D. 533.

(2) *Re Pritchard, Decd.* [1963] Ch. 502.

(3) *Maclaine Stokvis (Malaya) Ltd.* v. *Saloma Co.* [1959] M.L.J. 241.

(4) *Fick & Fick Ltd.* v. *Assimakis* [1958] 3 All E.R. 182.

(5) *Great Australian etc. Co.* v. *Martin* (1877) 5 Ch. D. 1.

The following cases were also cited in argument: *MacFoy* v. *United Africa Co. Ltd.* [1962] A.C. 152, 159; *Anlaby* v. *Praetorius* (1888) 20 Q.B.D. 764.

In the court below the following judgment was delivered on March 25, 1969:

Ibrahim J.: On 19th June 1962 the plaintiffs commenced action by way of a writ of summons specially indorsed with the statement of claim pursuant to O.3 r.6 of the Rules of the Supreme Court, 1957, claiming from the defendant the sum of $26,619.52 being the amount found to be due from the defendant to the plaintiffs on accounts stated between them in writing in a document signed by the defendant and dated 14th day of December, 1960. In compliance with O.3 r.1 their solicitors signed the indorsed statement of claim. The defendant entered appearance and filed his statement of defence within the prescribed time.

On an application made by the plaintiffs the court on 2nd September 1966 by consent of the parties ordered that "the plaintiffs be and are hereby at liberty to amend the writ of summons in the manner shown in red on the copy writ and indorsement of claim delivered with the summons in chambers No. 71 of 1966 and that the defendant be and is hereby at liberty to amend his defence within fourteen days from the 2nd of September, 1966 without prejudice to the defendant's rights to raise by his defence any points open to him." The order was made under O.28 r.1.

On 6th September 1966 the plaintiffs presented to the Assistant Registrar copies of the original writ amended as ordered by the court with the following request made in the form of a *praecipe:*

"Please amend the indorsement of claim on the original writ of summons under 0.28 r. 8 in the manner shown in red on the copy writ of summons and indorsement of Claim delivered with Summons in Chambers No. 71 of 1966 (now in Court file) and mark it with the date of the abovementioned order and the day on which the amendment is made under 0.28 r. 9 or permit the amendment to be made by the delivery herewith of the copy of the writ as amended.

Please issue copy of amended Writ to us for delivery to the defendant within the time allowed for amending the same under 0.28 r. 10."

The Assistant Registrar did not amend the indorsement of claim on the original writ but certified the amendment on the copies of the writ as amended which were presented to him as follows: —

"Amended this 6th day of September, 1966 pursuant to order of court made the 2nd day of September, 1966

Sd. Hakam Singh Gill
Asst. Registrar,
High Court, Malacca."

They were sealed with the seal of the court.

The amendment was only in respect of the indorsed statement of claim and the amended statement of claim reads as follows: —

"STATEMENT OF CLAIM

The plaintiffs' claim is for $26,619.52 being the amount found to be due from the defendant to the plaintiffs on accounts stated between them in writing in a document signed by the defendant and dated the 14th day of December 1960 with interest.

In the alternative for $26,629.52 being the amount due from the Defendant to the plaintiffs pursuant to paragraph 3 of a lease dated 20th January, 1959.

PARTICULARS

~~1960 December 14th Amount due as aforesaid $26,619.52~~

Balance as per statement of account dated 21.7.60 delivered to the defendant $42,249.42

Less: Difference in price of rubber in dispute $15,619.90
Bal: due: $26,629.52

And the plaintiffs claim interest at 6% per annum from 2nd August, 1960 to date of payment.

Sd. Allen, Gledhill & Ball
Solicitors for the Plaintiffs."

(The words underlined show the amendment which was in red).

The amendment was exactly in terms of the court order made on 2nd September 1966. A copy of the writ thus certified as amended was served on the defendant's solicitors and an amended statement of defence was filed by the defendant on 9th September 1966. Both the filed and delivered copies of the writ as amended were not signed by either the plaintiffs or their solicitors.

Hearing of the action commenced on 26th September 1966 when two preliminary points were raised, *viz.*, arbitration and jurisdiction. It was agreed that the point as to jurisdiction should be heard first and judgment was delivered on that point on 15th August 1968. The court held that it had jurisdiction. Further hearing of the case was fixed for 13th January 1969 but in the meantime the defendant made this application for an order that the "purported amended specially indorsed writ filed and delivered herein on the 6th day of September, 1966 and all subsequent proceedings thereto be set aside *ex debito justitiae* on the ground that the purported amended statement of claim by way of a specially indorsed writ not being a pleading and/or a pleading properly delivered, is a nullity." The application was supported by the defendant's affidavit dated 20th December 1968 paragraphs 4, 5 and 6 of which read as follows:—

"4. My counsel Mr. W. H. Sault and I made a search this day in the Registry of this Honourable Court and inspected the file in respect of this suit and noted that the purported amended statement of claim by way of a specially indorsed writ filed in this Honourable Court on the 6th day of September, 1966 had not been signed by the solicitors for the plaintiffs as required by the Rules.

5. The copy of the said purported amended statement of claim indorsed in the specially indorsed writ served on my solicitors as aforesaid also had not been signed by the solicitors for the plaintiffs.

6. I am advised by my solicitors and verily believe that the said purported amended statement of claim indorsed in the specially indorsed writ is not a pleading filed and delivered within the meaning of the Rules of the Supreme Court, 1957 and as such it is a nullity and should be set aside *ex debito justitiae*."

The hearing of this application was adjourned to open court for argument and the hearing proper of the action was postponed pending disposal of this application.

A writ of summons is not a pleading but the statement of claim specially indorsed on the writ is a pleading and a pleading must be signed in accordance with O.19 r.4 which requires that pleadings "shall be signed by the solicitor or by the party if he sues or defends in person." It was contended by the defendant that as neither the filed nor the delivered copy of the amended indorsed statement of claim was signed it was a nullity which could not be waived. It would have been a mere irregularity which could be waived had the filed copy been signed.

It was contended by the plaintiffs that all the requirements and rules regarding amendment had been complied with, that the amended indorsement need not be signed and that in any event the absence of a signature would not nullify the amended indorsement.

It was also contended that the typewritten words "Sd. Allen, Gledhill & Ball" would constitute sufficient signature of the plaintiffs' solicitors. I do not agree with this contention. In *The Queen* v. *Cowper*[1] it was held that even a litheographed impression of solicitor's name is not sufficient.

There is no specific rule which provides that amended pleadings must be signed but it may in my view be safely assumed that O.19 r.4 would also apply to amended pleadings. I therefore do not agree with the plaintiffs' contention that the amended indorsement need not be signed and that all the rules had been complied with regarding this amendment.

O.70 r.1 provides that "Non-compliance with any of these Rules, or with any Rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."

However, it was held by the majority in *Re Pritchard, Decd.*[2] (Lord Denning M.R. dissenting) that "the court has no power under R.S.C. Ord. 70 r.1 to cure proceedings which were a nullity" and on page 338 of the *Annual Practice* 1957, it is stated that "a pleading not signed is not a pleading "delivered" within the meaning of the rule, so if an unsigned statement of claim is delivered, it is a mere nullity."

In *Maclaine Stokvis (Malaya) Ltd.* v. *Saloma Co.*[3] the defendants applied by way of summons in chambers for an order that the service of the writ of summons and all subsequent proceedings be set aside on the ground that the statement of claim was not signed by the plaintiffs' solicitors. The statement of claim was by way of a specially indorsed writ pursuant to O.3 r.6. It was held that the writ was a nullity as it was not signed by counsel.

In *Fick & Fick Ltd.* v. *Assimakis* [4] the indorsement of the writ was signed by the plaintiffs' solicitors. The copy of the writ that was served on the defendant was in all respects identical with the original writ save that the copy did not bear the signature. It was held that as the writ which was issued was properly indorsed with a signed statement of claim, the absence of a signature to the statement of claim on the copy served on the defendant was cured by the appearance which the defendant must be taken to have entered.

James L.J. in *Great Australian etc. Co.* v. *Martin*[5] (quoted at page 338 of the *Annual Practice* 1957) said that the signature by counsel "to which the court was in the habit of paying, as it ought to pay, and always will be warranted in paying hereafter, the greatest possible respect, is to that extent a voucher that the case is not a mere fiction."

No case was cited which deals with signature of an amended indorsement similar to this case but as stated above by James L.J. the significance of the signature is that it vouches that the case is not a mere fiction and *Fick & Fick Ltd.* v. *Assimakis*[4] shows that an unsigned statement of claim served on the defendant may not in all cases amount to a nullity. In the present case the amended indorsement was in exact terms of the order made by the court which the defendant was not only aware of but also consented to. It was also vouched by the Assistant Registrar's certificate. I am therefore of the view that the unsigned amended indorsement in this case was not a nullity but was merely an irregularity which was waived by the delivery of the amended statement of defence to the plaintiffs by the defendant. I accordingly dismiss this application with costs.

From the above decision, the defendant appealed to the Federal Court.

FEDERAL COURT.

W. H. Sault for the appellant/defendant.

H. B. Ball for the respondents/plaintiffs.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal by the defendant against the judgment of the High Court at Malacca.

The plaintiff on a specially indorsed writ claimed against the defendant for a sum of $26,619.52 alleged to be money due on accounts stated between them.

On 15th August 1962 the defendant filed his defence denying the claim and alleged *inter alia* that no money was due by him but if there was any such money due, it would be due only under the terms and conditions of a deed of lease described in the statement of defence.

The plaintiff subsequently obtained an order of the court for amendments to the writ of summons and statement of claim. Three days later the defendant filed his amended defence.

About three years later, the defendant took out a summons in chambers for a declaration that the purported amended specially indorsed writ filed by the plaintiff on 6th September 1966 and all subsequent proceedings thereto be set aside *ex debito justitiae* on the ground that the amended statement of claim by way of specially indorsed writ not being a pleading and/or a pleading properly delivered is a nullity. The grounds advanced by the defendant were that the purported amended statement of claim filed on 6th September 1966 had not been signed by the solicitors for the plaintiff nor the alleged copy served on his solicitors.

The plaintiff on the other hand, pointed out that in pursuance of the order of the judge allowing the amendments to his writ and statement of claim, his solicitors had caused to be delivered to the Assistant Registrar of the High Court at Malacca a *praecipe* concerning the amendment of the writ in accordance with the leave granted by the court and on the same day the Assistant Registrar issued to his solicitors a copy of the said specially indorsed writ with the certificate that it had been amended pursuant to the order of the court and the plaintiff therefore said that he had complied with all the requirements and rules with regard to amendments.

The main question that we have to decide in this appeal is whether the amended statement of claim is a fresh pleading and must therefore be signed by the plaintiff's solicitors. It was contended on behalf of the defendant that such amended pleadings must be signed afresh by the solicitors on the ground that it is a pleading within the definition of the word in O.71. The learned judge held that it was a pleading but went on however, to say that the failure to sign it only amounted to an irregularity. He apparently based his decision on the judgment in *Fick and Fick Ltd.* v. *Assimakis.*[4] It was pointed out to us that in the *Fick and Fick* case only the copy served on the other party was not signed but in the present case both copies were not signed. It was also urged that the original statement of claim was never amended at all and that the Assistant Registrar's certificate was not fixed to the original and therefore the proceedings never started at all on the amended process for there was no amendment.

In my view, the first thing we have to consider is whether an amended statement of claim is a fresh pleading and therefore must be signed by the solicitor for the plaintiff as required by O.19 r.4. In my view, however, it is not a fresh proceeding. It is the same proceeding with amendments. I say so after reading the provisions of O.28 r.8 and 10. Rule 8 provides the method by which an indorsement or pleading may be amended if so done in writing. It is to be done by amending by writing alterations in the copy which has been delivered. It goes on to say that if the amendments require the insertion of more than 100 words in any one place or are so numerous or of such a nature that the making of them in writing would render the document difficult or inconvenient to read, then in either case, the amendment must be made by delivering a copy of the document as amended. Rule 10 requires that whenever any indorsement or pleading is amended such amended document shall be delivered to the opposite party within the time allowed for amending the same.

It would be apparent from the above provision that when an amendment is made by the plaintiff without leave under r.2 or with leave under r.6 of O.28, what in fact happened is that the same original pleadings continue to exist together with any such subsequent amendments. Where delivery is required under r.10 it is not in a sense the delivery of a new and fresh pleadings but is merely a delivery made for the convenience of the other side. I would therefore say that the appeal fails on this ground.

It was also urged by the appellant that under O.19 r.11a the plaintiff and the defendant shall in addition to delivering copies of their respective pleadings to each other, file such pleadings in the registry of the Supreme Court from which the writ has issued. Here again the argument fails for the same reasons given above.

Suffian F.J.: With respect I agree that this appeal be dismissed.

Statements of claim should be signed by a solicitor or by the party concerned if he has no solicitor. This

is because they are pleadings as defined by Order 71 rule 1(10) and because the last sentence in Order 19 rule 4 provides:

"Pleadings shall be signed by the solicitor, or by the party if he sues or defends in person."

But I do not agree that amendments to the statement of claim made in the circumstances of this case should have also been signed.

It is true that *prima facie* pleadings are defined by Order 71 rule 1(10) to include statements of claims such as the one in this case, but it should be noted that the definition applies only where there is nothing in the subject or context repugnant to it, and I think that there is something in the context of Order 28 (which deals specifically with amendments) which is repugnant to the application of the definition to the circumstances of this particular case. The amendments were in exact terms of the order granting leave to amend, and they were also vouched for by the seal of the court; furthermore, the plaintiff has complied with rules 8, 9 and 10. The original statement of claim bore the plaintiff's solicitor's signature, the amended statement bore only his solicitor's name, but in my view the absence of his solicitor's signature is only an irregularity. I am fortified in my view by the fact that amendments in the course of a trial may be made with less formality than has been observed here.

Secondly, the unimportance in practice of this omission by the plaintiff's solicitor signing the amended statement of claim is borne out by the fact that the defendant did not object to its validity until nearly three years later, after he had himself filed and served his amended defence. Order 70 rule 2 says that no application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party has taken any fresh step after knowledge of the irregularity. The learned judge was therefore right to dismiss the defendant's application.

Ali F.J. concurred.

Appeal dismissed.

Solicitors: *Sault, Keith Sellar & Co.; Allen, Gledhill & Ball.*

KONG CHENG WHUM v. TENGKU BESAR ZABAIDAH

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) November 28, 1969]

[Kuala Trengganu — Federal Court Civil Appeal No. X-45 of 1969]

Landlord and Tenant — Rent — Excess payment — Claim for recovery — Expiry of statute — Effect of — Increase of rent with consent of tenant — No necessity to give notice to end previous tenancy — Control of Rent Ordinance, 1956.

Legislation — Expiry of statute — Effect of — Interpretation and General Clauses Ordinance, 1948, s. 15.

This was an appeal against the decision of Syed Othman J. ([1969] 2 M.L.J. 224) dismissing the counterclaim of the appellant for rents alleged to be paid in excess. The learned trial judge held: (a) the claim for the excess paid while the 1956 Control of Rent Ordinance was in force in Kelantan i.e. until June 30, 1964, could not succeed as that statute had been allowed to expire; (b) the claim for the excess paid after July 1, 1964 also could not succeed because the parties had mutually agreed to the payment of the rent of $120.

Held, dismissing the appeal: (1) (Ali F.J. dissenting) the learned trial judge was correct in holding that as the Control of Rent Ordinance, 1956, had expired, no proceedings could be instituted to recover any rent paid in excess after the expiry of that Ordinance;

(2) the learned trial judge was correct in holding that the rent paid after July 1, 1964 was not excessive because the parties had mutually agreed to this rent and (i) there was no control in force until December 31, 1964 and (ii) after July 1, 1965 that increased rent was the "standard rent" when the Control of Rent Ordinance was revived;

(3) it was not necessary for the landlord first to give notice to terminate the tenancy before increasing the rent as the tenant had agreed to this increase of rent.

Cases referred to:-

(1) *Surtees* v. *Ellison* (1829), 9 B. & C. 750, 752.

(2) *Kay* v. *Goodwin* (1830), 6 Bing. 576.

(3) *Wicks* v. *Director of Public Prosecutions* [1947] A.C. 362, 366.

(4) *Fenner* v. *Blake* [1900] 1 Q.B. 426, 428.

(5) *Inchiquin (Lord)* v. *Lyons* (1887) 20 L.R. (I.) 474.

(6) *Che Esah & Anor.* v. *Che Limah* [1966] 1 M.L.J. 36.

The following cases were also cited in argument: *Ho Choon Chee* v. *Leong Yee Sin* [1964] M.L.J. 44; *Edgware Estates Ltd.* v. *Coblentz* [1949] 2 K.B. 717; [1949] 2 All E.R. 527, 531; *Ng Chik Puah* v. *Chop Hoe Thong* [1962] M.L.J. 349; *Devraj Nahar & Ors.* v. *Gian Singh & Co.* [1963] M.L.J. 173; 174; *Arunachalam Chettiar* v. *Kow Guan* [1963] M.L.J. 253, 255.

FEDERAL COURT.

H. L. Wrigglesworth for the appellant.

Raja Abdul Aziz bin Addruse for the respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the judgment of the High Court at Kota Bharu, Kelantan.

The landlord, who happens to be a lady, and the respondent in this appeal, originally claimed against the tenant for the recovery of certain premises known as No. 2725 Jalan Tok Hakim, in the local authority area of Kota Bharu.

The tenant denied the claim and at the same time counter-claimed for the return of $11,455 which he alleged he had paid to the landlord in excess of the lawfully permitted rent. The premises were subject to the control of rent law. The landlord denied the counter-claim and also pleaded the Limitation Ordinance in reference to the alleged over-payment of rent paid during the period between 21st January 1947 and 20th January 1959.

The landlord subsequently withdrew her claim for possession of the said premises and the court below proceeded to hear the tenant's counter-claim but on the tenant conceding to the defence of limitation, proceeded to do so only in reference to the counter-claim for the over-payment between 21st January 1959 and 21st January 1965.